Supreme Court, U. S.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1831

LAURENCE A. HECKER
Petitioner,

vs.

TOWNSHIP OF DOVER
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the New Jersey Supreme Court

LAURENCE A. HECKER, ESQ.
109 Divison Street
Toms River, New Jersey 08753
Pro Se

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OCTOBER TERM, 1979

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LAURENCE A. HECKER
Petitioner,

vs.

TOWNSHIP OF DOVER
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the New Jersey Supreme Court

Petitioner, Laurence A. Hecker, prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court and the Superior Court of New Jersey, Appellate Division entered respectively on October 29, 1979, and February 11, 1980, affirming a judgment against petitioner and that on hearing the said judgment be reversed.

OPINIONS BELOW

The decision of the New Jersey Supreme Court is not reported and is attached hereto.

The opinion of the Appellate Division of the Superior Court is not reported and is attached hereto.

JURISDICTION

The judgment was entered by the Law Division, Ocean County, Superior Court of New Jersey on May 8, 1978 following a jury trial. Said judgment was affirmed by the Appellate Division of Superior Court and the New Jersey Supreme Court. This Court has jurisdiction pursuant to the Fourteenth Amendment to the U.S. Constitution.

QUESTIONS PRESENTED

1. Whether the introduction of evidence at trial pertaining to the malicious prosecution and malicious abuse of process counts constituted fundamental unfairness to the petitioner by virtue of the inflammatory and highly prejudicial nature of the testimony, particularly in view of the denial of a motion for summary judgment prior to trial on those issues.

2. Whether the introduction of post-judgment documentation and argument thereon by

the plaintiff-respondent in its appellate brief constituted such prejudice as to preclude a fair hearing by the Appellate Division.

3. Whether the factual inaccuracies in the opinion of the Appellate Division render its conclusion as to the submission of an exhibit containing theories of damages to the jury arbitrary and unreasonable.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment (applicable portion)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Township of Dover instituted suit against its former municipal attorney, Laurence A. Hecker, alleging that he wrongfully and excessively billed the municipality for professional services rendered during his tenure of three years, two months. The complaint contained counts alleging fraud, conversion, unjust enrichment, existence of a constructive trust, debitatus assumpsit, malicious prosecution and abuse of process. An amended complaint sought statutory penalties for alleged unlawful retention of files.

Petitioner, Laurence A. Hecker, answered and counterclaimed against the municipality for unpaid bills which allegedly were due and owing to him.

Plaintiff Township's claim for statutory penalties was dismissed on motion but a motion by petitioner-defendant to dismiss the counts of malicious prosecution and malicious abuse of process prior to trial was denied. At the opening of trial, plaintiff successfully moved

to dismiss defendant's counterclaim on the basis of the single controversy doctrine, defendant having failed to raise the issue of unpaid fees in a prior law suit in which petitioner was the plaintiff and respondent was the defendant. Following the plaintiff's case, petitioner-defendant moved for and obtained dismissals of the counts raising the issues of malicious prosecution, malicious abuse of process, conversion and constructive trust.

The remaining issues in the case were submitted to a jury, and a $110,000 verdict was returned against the defendant.

On June 26, 1978, defendant's motion for a new trial was denied, and thereafter defendant filed an appeal with the Appellate Division of the Superior Court of New Jersey. Plaintiff Township filed a cross-appeal. On October 29, 1979, the Appellate Division affirmed the verdict. A petition for certification to the New Jersey Supreme Court was denied on February 11, 1980.

REASONS FOR GRANTING THE WRIT

1. The introduction of evidence at trial pertaining to the malicious prosecution and malicious abuse of process counts constituted "fundamental unfairness" to the defendant by virtue of the inflammatory and highly prejudicial nature of the testimony, particuarly as presented by witnesses Robert Brune and Charles Gilroy.

Substantially no more evidence was presented at trial than accompanied the motion for summary judgment prior to trial to dismiss the malicious prosecution count. The reason given by the Court for not granting the motion -- basically, to afford the plaintiff the opportunity to prove special grievances or special damages in connection with disqualification of the municipal attorney from defending the original action -- was shown to be irrelevant in terms of the governing law when he dismissed the malicious presecution claim at the conclusion of the plaintiff's case. A motion for leave to appeal the denial of the

motion was dismissed by the Appellate Division, so that all attempts to preclude the testimony pertaining to the issue from coming before the jury were exhausted.

The testimony presented by plaintiff relating to issues which were dismissed at the end of the plaintiff's case stood unrebutted before the jury, the defendant being deprived of an opportunity to counter the testimony with that on his behalf. Petitioner represents that such testimony would have been substantially at variance with that presented by the plaintiff. The only alternative for the defendant would have been to permit those counts to go before the jury, which was not a reasonable choice of strategies. The defendant had no realistic option but to move for dismissal of the malicious prosecution and malicious abuse of process counts even though it precluded him from nullifying or overcoming the testimony presented by the plaintiff on those issues.

Although testimony may be incompetent on

one ground but admissible on another and for that reason, even if prejudicial, be permitted, that is not the same as precluding the jury from making a decision after hearing testimony that, after the fact, became irrelevant and which had all along been highly prejudicial. Not even a limiting instruction, if given, could have saved the harm resulting from the jury's receiving such unrebutted testimony, and it was plain error for the Court not to order a mistrial. Using the attorney for the plaintiff's own words, relating to another matter in the trial, "once you put a stink bomb in the court room, you can take all of the perfume in the world; the stench still remains", and that is the problem facing the defendant in this matter in that once the jury heard the offensive testimony, all of the instructions could not cure the resulting prejudice and harm.

It is a fundamental right that litigants are to be protected from inflammatory and irrelevant material as the same constitutes the essence

of prejudice. The denial of this fundamental right is clearly highlighted in that the damage to the defendant was foreseeable by the trial court, having had the benefit of participating in the argument for summary judgment. See 5 Am Jur 2d § 549 and cases cited: "a reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. (Footnote omitted)." See also 5 Am Jur 2d §§ 791 and 792 and cases cited which indicate that characterization of error as harmless, even if the eventual judgment appears to have a foundation in the proof produced at trial, is no barrier to attack on appeal when involving a fundamental right. The constitutional underpinnings of an appellate court's obligation where fundamental rights and hence due process are involved is discussed at 16A Am Jur 2d § 819 and cases cited.

Evidence which will only serve to prejudice the minds of the jury is properly excluded, 29

Am Jur 2d § 261, p. 310, but in this situation the highly prejudicial testimony complained of was properly admitted at the time offered but subsequently, as a result of dismissal of the malicious abuse and malicious prosecution counts, that testimony retroactively became highly prejudicial to the defendant, since clearly it could never have been introduced had those two counts been eliminated from the matter as a result of the motion for summary judgment. Thus, a novel question is presented: Should a mistrial be granted when testimony properly admitted although highly inflammatory is rendered irrelevant by subsequent dismissal of the counts upon which the testimony was based.

2. The appellate brief of plaintiff introduced material pertaining to post-judgment actions taken by the defendant, alleging fraudulent conveyances and improper transfers of property to avoid having to pay the judgment. This was a one-sided argument, again no proper opportunity being presented to furnish rebuttal

data to the Court. The only purpose, since the appeal was from the judgment, would have been to unduly color the character of the defendant and to place credibility in issue, which could not have been done in any other fashion, or certainly in any proper fashion.

Even though the prejudice inherent in such discussion was presented to a judicial tribunal and not laymen, nevertheless, particularly because a lawyer is the defendant, a taint attaches to the presentation of such material to the Appellate Division and to its consideration by that Court.

It is suggested that an appropriate alternative would have been for the Appellate Division to return the brief containing the scandalous material, directing excision of the offensive material, disqualifying itself as the panel to hear the case and referring the appeal to a different panel.

To permit the statements pertaining to post-judgment activities to remain in the

appellate brief constitutes that quality of "fundamental unfairness" deserving the protection afforded by the U. S. Supreme Court. See the cases cited in Am Jur above.

3. The Appellate Division upheld the inclusion in the jury room of what has become known as J-1, which was an exhibit containing not merely a list of damages but theories set forth by the expert witness for the plaintiff as to how damages should be calculated. J-1 was not introduced into evidence since it relied on alleged facts not part of the record and not admitted into evidence, including speculation by the expert witness as to the rate of compensation paid to the defendant and the number of hours worked by him, inter alia.

On page ~~10~~ 12 of the Appellate Division opinion, the Court said, "Bearing in mind that nothing in J-1 is unsupported by evidence in the case,". Nothing could be further from the truth. The brief of the plaintiff in no instance contends that J-1 was supported entirely by

evidence nor was that indicated by the trial judge in his refusal to grant the objection raised by the attorney for the defendant to J-1 being taken into the jury room. That statement by the Court was inconsistent with the record, and the logical conclusion to be drawn is that the Appellate Division acted arbitrarily and without proper foundation in making a ruling on J-1, the opinion demonstrating a lack of requisite familiarity with the record to make a fair and reasoned decision.

While error alone certainly does not create a constitutional issue, actions that are arbitrary or unreasonable justify the claim of denial of due process, and it is suggested that that level has been reached in this matter.

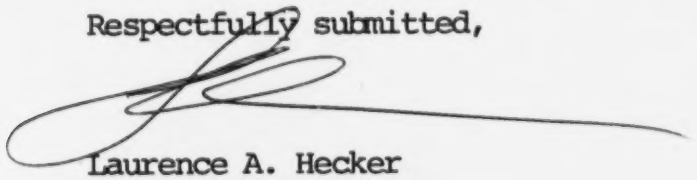
J-1 was described by plaintiff's counsel as "summary sheets of the testimony that he has given as an expert witness with respect to the damages in the amount of the overcharges and unreasonableness of the fees". The witness limited his review to approximately 12 to 15

bills out of a total of about 130, which had been submitted by the defendant. On the witness stand, he postulated several theories whereby he projected his opinion as to the extent of the damage suffered by the plaintiff as a result of the defendant's alleged overbilling, and these theories were supposedly reflected in summary fashion by J-1 (attached hereto).

The Appellate Division found that J-1 constituted a list of claims permitted by court rule (New Jersey R. 1:8-8) but also said, "we do not dismiss entirely defendant's contention that J-1 contains considerably more than a listing of claims. There are matters, contained therein, that would have best been omitted", however, the Court criticized defense counsel for having taken "a gamble on either excluding it entirely or letting it go to the jury as is". The test thus established by the Appellate Division was improper and contrary to due process since it created an unreasonable burden upon the defendant. In addition, the transcript demonstrates that

counsel for the defendant carefully suggested to the trial judge the relative risks inherent in submitting J-1 to the jury, and a cautioning instruction by the trial judge following approximately four weeks of trial in a matter involving approximately 300 exhibits is contended to be insufficent.

Respectfully submitted,



Laurence A. Hecker
109 Division Street
Toms River, New Jersey 08753
Pro Se

SUPREME COURT OF NEW JERSEY
C-420 SEPTEMBER TERM 1979

TOWNSHIP OF DOVER,

Plaintiff-Respondent,
Cross-Petitioner,

v.

LAURENCE HECKER,

Defendant-Petitioner,
Cross-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4362-77 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice at Trenton, this 11th day of February, 1980.

FILED
SUPREME COURT
Feb. 12, 1980
Stephen W. Townsend
Clerk

s/ Stephen W. Townsend
Clerk

TRUE COPY
Stephen W. Townsend
Clerk

ASSUMPTION: 40 Billable Hours Per Week

40 Hours x 49 Weeks x $50/hour	=	$ 98,000.00 per year
		8,166.66 per month
38 months	=	310,333.33
Hecker billed		$432,040.07
	-	310,333.33
		$121,706.74
Total Bills to Dover Township		$328,372.90
	-	121,706.74
Hecker Should Have Billed		$206,666.16
Hecker Paid by Township		$286,929.58
	-	206,666.16
DAMAGES		$ 80,263.42

J-1 Id.
4/18/78

HECKER'S "BILLABLE HOURS"

Total Bills to Dover Township (38 Months)	$328,372.90
Total Receipts, Dover Township Miscellaneous	
1972*	1,788.00
1973*	1,918.75
Total Receipts, Borough of South Toms River	
1973*	10,128.00
Total receipts, Private Practice	
1971**	32,878.00
1972**	24,909.75
1973**	25,987.47
Total Receipts, Private Practice (Jan. & Feb., 1974)*	6, 057.20
Total Billings 38 Mos.:	$432.040.07

Average per Month: $ 11,369.48
Average Per Year: $136,433.70
Average Hours at $50/hr.: 2,728.67
Weekly Average 49 weeks: 55.7 hours

*Source: Hecker's receipts and disbursements ledgers

** Source: Hecker's federal tax returns less items from ledger for Dover Township and South Toms River

HECKER'S "BILLABLE HOURS"

Total Bills to Township - 38 months:		$ 328,372.90
Total Receipts - Non-Township matters:		
	1971*	32,878.00
	1972*	26,697.75
	1973*	38,034.22
Jan. & Feb.	1974**	6,057.20
Total Billings 38 months:		$ 432,040.07
Average Per Month:		11,369.48
Average Per Year:		$ 136,433.70
Annual Hours at $50/hr.:		2,728.67
Weekly Average 49 weeks:		55.7 hours

* Source - Hecker's Income Tax Returns

**Source - Receipts and Disbursements Ledger

INFLATED BILLS TEST

Court House Square case

INVOICE 16588:	January 15, 1974	$1,975.00
INVOICE 24950:	February 23, 1976	500.00

RATIO: $500/$1,975 = .253 of original bill

Greater American Communities case

INVOICE 10272:	January 4, 1973	$ 385.00
INVOICE 24950:	February 23, 1976	113.00

RATIO: $113/$385 = .293 of original bill

AVERAGE RATIO: .273

Total of All Bills Submitted:	$ 328,372.90
	x .273
Actual Value	$ 89,645.80
Dover Township Paid Hecker	$286,929.58
	- 89,654.80
DAMAGES	$197,274.78

SUMMARY

UNNECESSARY REVIEW OF MINUTES, ETC.	$11,510.00
UNNECESSARY "REVIEW OTHER RESOLUTIONS"	2,890.00
WORK PERFORMED BY OTHERS	27,928.14
UNCREDITED RETAINERS	2,000.00
POLICE FACILITIES BOND ISSUE	6,000.00
KNOWN DOUBLE BILLINGS	1,462.00
EXPERTS EVALUATION OF INFLATED BILLS FOR WESTMONT SHORES AND PETLIN CASES	30,000.00
	$81,790.14

OVERCHARGES FOR

WORK PERFORMED BY OTHERS

LINDA KALMANOWITZ, ESQ.	$17,216.00
JAY GRUNIN, ESQ.	785.00
THE RESEARCH GROUP	8,059.29
LAW STUDENTS	1,602.00
TYPING	265.85
TOTAL	$27,928.14

JAY GRUNIN, ESQ.

INVOICE NO.	MATTER	GRUNIN HOURS	HECKER PAID GRUNIN	HECKER CHARGED TP	AMOUNT OVERCHARGED
	Malta	7	$300.00	$1,000.00*	$700.00
16584	Silver Bay	7 1/2	250.00	375.00	85.00
*Estimated				TOTAL	$785.00

THE RESEARCH GROUP

INVOICE NO.	MATTER	T.R.G. HOURS	HECKER PAID T.R.G	HECKER CHARGED TP	AMOUNT OVERCHARGED
16586	Sacco	27.5	$375.25	$1,315.00	$1,002.75
15891	Petlin	40.1	461.15	4,375.00	3,913.85
15893	Westmont Shores	17.5	223.50	875.00	615.50
	Misc.	66*	808.81	3,300.00*	2,491.19
*Estimate based upon extrapolation				TOTAL	$8,059.29

LAW STUDENTS

INVOICE NO.	MATTER	STUDENT	HOURS	HECKER PAID STUDENT	HEKCER CHARGED TP.	AMOUNT OVER-CHARGED
16585	Yablonicky	Henningsen	24	$120.00	$1,200.00	$1,080.00
10272	Getty Oil	Tortis	12	78.00	600.00	522.00
				TOTAL		$1,602.00

TYPING AND
NON-ATTORNEY SERVICE

INVOICE NO.	MATTER	AMOUNT IMPROPERLY CHARGED
14939	Dog Control Memo	$106.50
17147		78.85
26008		80.05
		$265.85

LINDA KALMANOWITZ

INVOICE NO.	MATTER	KALMANOWITZ HOURS	HECKER PAID KALMANO.	HECKER CHARGED TP	AMOUNT OVER-CHARGED
1411	Sacco	16	$160.00	$640.00	$480.00
1411	P.U.C.	10	100.00	400.00	300.00
1808	Toms River Water	23	230.00	950.00	720.00
1808	Incineration	5	50.00	250.00	200.00
1800	Mundy memo	3	30.00	175.00	145.00
1800	Incineration)			25.00	
1809	Incineration)	6	60.00	262.00	227.00
11648	CATV Research	12	120.00	700.00	580.00
11648	West Point Isl.	13	130.00	700.00	570.00
15893	Westmont Sh.	27.5	275.00	1,375.00	1,100.00
16582	Community Inv.	40.5	405.00	2,025.00	1,620.00
17996	Wilkerson	6.5	65.00	325.00	260.00
10246	Lathrop/Tice	28	280.00	1,400.00	1,120.00
16585	Yablonicky	14	140.00	700.00	560.00
17999	Doss	42	420.00	2,100.00	1,680.00
24809	Sharkey	11	110.00	487.50	377.50
15887	Hernandez	32	320.00	1,600.00	1,280.00
22575	Duckworth	9.5	95.00	475.00	380.00
22576	Shell Oil	34	240.00	1,437.50	1,097.50
12651	Police-confiscated goods	1.5	15.00	75.00	60.00
14939	Dog Cont. Memo	36	576.00	1,080.00	504.00
24801	Fleischman	18	180.00	900.00	720.00
24048	Simon Appeal	14	140.00	700.00	560.00
12653	Turnpike Spur	26	260.00	1,300.00	1,040.00
13545	Turnpike Meeting	2	20.00	45.00	25.00
13548	Unimproved Sts.	4	40.00	130.00	90.00
13548	Township Mtg.	3	30.00	75.00	45.00
13548	Township Conf.	3	30.00	125.00	95.00
13548	Township Conf.	3.5	35.00	135.00	100.00
1413	Tax Appeals	32	320.00	1,600.00	1,280.00
				TOTAL OVERCHARGED	$17,216.00

Payments to Linda Kalmanowitz - 1971

Date	Amount	Check No.	
5/7/71	$180.00	G 3438	
5/20/71	280.00	G 3478	
6/3/71	240.00	G 3518	
6/23/71	240.00	G 3592	
7/22/71	280.00	G 3689	
8/31/71	895.00	G 3776	
9/30/71	623.90	G 3865*	
11/8/71	350.00	G 3995	
11/16/71	35.00	G 4026	
12/1/71	230.00	G 4072	
12/20/71	240.00	G 4127	
	$3,593.90		

*Incl $3.90 "expense"

Payments to Linda Kalmanowitz - 1972

2/10/72	$305.00	G 4298	
4/4/72	275.00	G 4449	
	$580.00		

Payments to Linda Kalmanowitz - 1973

3/26/73	$325.00	G 5446	
4/5/73	320.00	G 5474	
4/23/73	375.00	G 5521	
5/2/73	340.00	G 5541	
5/24/73	575.00	G 5597	
6/11/73	590.31	G 5648	*1
6/28/73	650.00	G 5699	
7/10/73	396.95	G 5734	*2
7/23/73	420.00	G 5772	
8/7/73	575.54	G 5822	*3
9/20/73	292.80	G 5938	*4
10/24/73	576.00	G 6029	*5
	$5,436.60		

*1 Incl. $10.31 telephone
*2 Incl. $1.95 telephone
*3 Incl. $5.74 telephone
*4 Incl. $12.80 telephone
*5 Paid at $16.00/hour

KNOWN DOUBLE BILLINGS

Inv. #1	Inv. #2	Matter	Amount
4/7/71	16585	Memo re Yablonicky	$450.00
5/21/71	16585	Phone-Clark 5/12/71	5.00
7162	16586	Hearing-Sacco 4/14/72	175.00
3963	16586	Court-Sacco 12.3.71	150.00
1807	10246	Conference-Lathrop 9/1/71	125.00
1409	1411	Letter-Newman 9/17/71	5.00
1808	15893	Letter-Miller 8/23/71	5.00
1421	24801	Disbursement-Rivera (twice)	30.00
7162	7167	Letter-Bloustein 6/22/72	10.00
7161	7162	Letter-Russell 3/23/72	5.00
5049	7161	Letter-Ravaschiere 5/30/72	5.00
5049	7161	Letter-Judge Angen 5/30/72	10.00
5049	7161	Letter-Clement 5/31/72	35.00
7161	16586	Letter-Alaimo 3/21/72	5.00
13545	13550	Meeting 7/19/73	75.00
7167	7171	Phone-Levin/Matthews6/8/72	10.00
1801	1801	Phone Conf., Beck 7/6/71	5.00
1807	1807	Phone Conf., Ross 9/7/72	5.00
5049	5049	Phone Conf., Clerk 3/6/72	5.00
7167	7167	Two letters, 8/2/72	10.00
7167	7167	Letter, Brochon 8/4/72	5.00
8600	8600	Two letters, 10/25/72	10.00
13538	13538	Ph. Conf., Bathgate6/18/73	5.00
14935	14935	Letter, Adminis., 10/12/73	5.00
10272	24950	Greater American Comm.*	272.00
		TOTAL	$1,422.00

*Overpayment as reflected in double billing:

Invoice 10272 $385.00

24950 113.00 (unpaid)

Difference $272.00

UNCREDITED RETAINERS

RETAINER CHARGED IN INVOICE	MATTER	RETAINER NOT CREDITED IN INV.	AMOUNT NOT CREDITED
11648	Cool River Valley	10279	$ 500.00
1801	Petlin	15891	500.00
	Wilkerson, Yablonicky	16585, 17996	500.00
5/21/71	Doss	17999	500.00
	TOTAL		$2,000.00

UNNECESSARY REVIEW

OF MINUTES,

APPLICATIONS AND CORRESPONDENCE

INVOICE NO.	AMOUNT IMPROPERLY CHARGED
1808	$ 1,125.00
1803	1,925.00
1415	3,165.00
7162	3,295.00
10272	2,000.00
	$11,510.00

UNNECESSARY REVIEW

OF MINUTES,

APPLICATIONS AND CORRESPONDENCE

INVOICE NO.	SUBJECT	AMOUNT IMPROPERLY CHARGED
1808	Minutes, Planning Board (PB)	$375.00
	Minutes, Bd. of Adjustment	325.00
	Communications, Planning matters	275.00
	Applications, Planning Board and Board of Adjustment	150.00
		$ 1,125.00
1803	Communications, D.P.W.	125.00
	Communications, Sewer.Auth.	75.00
	Communications, Munc. Court	50.00
	Communications, Bldg. Dept.	375.00
	Communications, Bd. of Ed.	100.00
	Communications, Rec. Comm.	200.00
	Communications, Welfare Bd.	250.00
	Communications, Police Dept.	350.00
	Communications, Tax Assessor	250.00
	Communications, Indus. Comm.	150.00
		$ 1,925.00

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4362-77

TOWNSHIP OF DOVER,

Plaintiff-Respondent
and Cross-Appellant,

v.

LAURENCE HECKER,

Defendant-Appellant
and Cross-Respondent.

Argued October 2, 1979. Decided October 29, 1979

Before Judges Morgan and Horn

On appeal from Superior Court of New Jersey,
Law Division, Ocean County

J. Roger Conant argued the cause for appellant-cross-respondent (Conant & McCreedy, attorneys; Mr. Conant on the brief)

William J. Linton argued the cause for respondent-cross-appellant (Raymond A. Hayser, Director of Law, Dover Township Law Department, attorney; Mr. Linton on the brief).

BY THE COURT

The central controversy which occupied a trial court and jury for fourteen trial days and now comes before us on appeal concerns the amount and necessity of legal fees charged plaintiff, Township of Dover, by its part-time attorney, defendant Lawrence Hecker, between January 1, 1971, the date he was originally retained, and February 20, 1974, the date on which his resignation became effective. Plaintiff's fundamental position was that contrary to defendant's written assurances that work for which he billed the Township was done, needed to be done, and that the fees were reasonable, he charged it for work not done, other work which was unnecessary and in amounts which were not agreed to and excessive. Defendant also secured public monies in several other ways characterized as fraudulent.

The jury apparently credited some of these allegations because they returned a verdict in the Township's favor in the aggregate amount of

$110,000 representing the amounts defendant procured by fraud and through unreasonable charges. Defendant does not contend, on appeal, that this verdict was against the weight of the evidence. Rather, he urges this court to reverse the trial court judgment for trial errors he contends so seriously prejudiced his defense that he is entitled to a new trial. He also contends that the trial court erroneously dismissed on "single controversy" grounds, his counterclaim for fees billed the Township remained unpaid. The Township cross-appeals contending error in dismissal of the count alleging that a prior suit brought by defendant Hecker against the Township and several of its officials, and later dismissed, was brought for improper motives and hence constituted malicious abuse of process for which damages were sought. The other basis for the Township's cross-appeal is the dismissal of its claim for the penalty imposed by N.J.S.A. 40A:5-20, a $50 per day penalty for each day defendant refused to return the Township's files.

A summary of all factual matter uncovered at the trial is neither necessary nor wise. Tracing the factual contours of the controversies as they pertain to the issues raised on this appeal should suffice.

Defendant, an attorney, admitted to practice in 1965, became part-time Township attorney in January 1971 pursuant to an agreement that he would not be paid a salary but would be paid for work done on an hourly basis. It is largely undisputed that the agreed rate was $50,[1] and that was the rate usually charged. The major exception was in the case of court appearances for which defendant would charge the Township $700 per day (if he was present in court for more than half a day) or $350 a half a day or less. The Township vigorously denied that it agreed or would have agreed to such a high rate of compensation for court appearances.

---

1 There were some exceptions. Defendant admitted charging more where difficult questions were involved or where an emergency arose.

Each bill submitted by defendant to the Township was accompanied by a declaration form, signed by him, which included the following above his signature:

> I do solemnly declare and certify under the penalties of the law that the within bill is correct in all its particulars; that the articles have been furnished or services rendered as stated therein that no bonus has been given or received by any person or persons within the knowledge of this claimant in connection with the above claim; that the amount therein stated is justly due and owing; and that the amount charged is a reasonable one.

One of plaintiff's theories of action was based upon these certifications on which the Township relied and on which, it is alleged, defendant knew the Township would rely. The alleged falsity of these representations which accompanied each bill was one of the theories upon which plaintiff sought recovery. Thus, according to the Township, the bills submitted were rife with misrepresentations as to the nature of the work done, the length of time spent doing it, and who did the work. Evidence indeed showed that defendant kept few, if any,

records of the time spent on the matters for which he reportedly billed the Township on a time basis. He admitted that even when he did the work himself, his bill merely reflected his recollection of the time spent on each activity. The Township emphasized defendant's admitted practice of "subcontracting out" research work to others, such as law students, other lawyers, and a Maryland research group, and paying for the research on a relatively modest hourly rate, such as $10 per hour. Without disclosing that fact, defendant would bill the Township for that work at the agreed $50 per hour rate using the hours spent by the student or research group as the basis of the charge. Expert proof adduced by plaintiff took the view that such practice was improper; defendant should have disclosed the practice and the fact of payment by charging for it as a disbursement.

The Township contended, supported by substantial evidence at trial, that defendant billed for work not done. The most glaring

example of this practice, according to the Township, arose out of a bond issue for improved court and police facilities. New York bond counsel and a financial consultant were retained. Bond counsel did all the work and forwarded the product to defendant as Township attorney, who merely forwarded the documents to the Township. Bond counsel was paid $3,680. Although Hecker performed no work in connection with the bond issue, other than copying bond counsel's documents on "mag" cards for possible later use as forms, defendant sent the Township a bill, which it paid, for $8,650 for" in excess of 150 hours" spent on the work.

Another of plaintiff's theories of recovery was for amounts paid defendant for work plaintiff conceived to be unnecessary, such as the reading of minutes of the planning board and zoning board meetings, and communications among the several municipal departments. Apparently, defendant, who was on the mailing list for all this printed matter affecting the Township, read

the material and billed the Township for the time spent in doing so. According to the Township, the planning board, zoning board and other departments of the Township had their own counsel. Defendant was not expected or asked to read the minutes of such meetings or other communications.

There were other occasions where, admittedly and allegedly by mistake, defendant billed the Township twice. There were other occasions where "retainers" given in advance of services performed were not credited to the Township's account for that service.

We do not wish to belabor the factual aspect of plaintiff's case. Our only intention is to demonstrate the legitimacy of plaintiff's concern for the jury's need of some aid in guiding it through this morass of evidence in its deliberations. Plaintiff designed exhibit J-1, the basis for defenant's first claim of trial error, with this purpose in mind. J-1 is a multi-paged exhibit which recapitulates much

of the proof in the case and does so in relation to plaintiff's several theories of recovery. A copy of this exhibit was delivered to defendant's counsel well in advance of its application to permit its use by the jury during deliberations.

R. 1:8-8 provides:

> The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by a jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties.

Defendant's objection to the proposed use of this exhibit pointed out that it went far beyond a list of claims; rather, he contends that much of it was argument the presence of which in the jury room during deliberations, would prejudice his case.

Defendant's objections, however, went to the exhibit as a whole. No objection to any specific part or parts was made so that, if

justified, the offending part could be excised. Defendant's objection left the court in the position of permitting jury use of the exhibit with strict instructions or leaving the jury to flounder on its own totally unaided. He chose the former course giving the following instructions to the jury:

> Now, there's a rule of court that permits the Court to have the jury take into the jury room a list of claims made by the plaintiff in this case. The Court will permit that list to go into the jury room with the following restrictions and cautions: This list is not, and I stress the word not, evidence. It is being submitted to you merely as a guide to aid you in evaluating the evidence itself. It is to be used for no other purpose. If you find that it is not in conformity with the evidence, you are to disregard it and not to refer to it. It is merely a permissive aid and it will not, nor will any part of it, constitute any evidence which you may consider in your deliberations in this case.

The trial court action in permitting jury use of J-1 during deliberations under the foregoing instructions is defendant's first ground of appeal.

We have examined exhibit J-1 with care and

conclude that it is indeed a list of claims falling within the purview of R. 1:8-8. For example, it summarizes the Township's claim based upon defendant's overcharges for work done by others by collecting all the information relevant to that claim, totalling it and giving the jury the total sum plaintiff seeks for that claim. It could, with justification, be compared to a list of medical expenses, doctor by doctor, with a total, in a typical personal injury action. In this case, however, the claims are many, instead of few, and complex, instead of relatively simple. Necessity and convenience, if nothing else, dictate the availability of means to aid the jury in reaching a reasoned and rational result. See, Associated Metals, etc. Corp. v. Dixon Chemical, etc., 82 N.J. Super. 281, 309-310 (App. Div. 1964), certif. den. 42 N.J. 501 (1964).

We do not dismiss entirely defendant's contention that J-1 contains considerably more than a listing of claims. There are matters,

contained therein, that would have best been omitted. The problem is, however, that defendant did not specifically object to the objectionable aspects of J-1. Rather, in our view, he took a gamble on either excluding it entirely or letting it go to the jury as is. Bearing in mind that nothing in J-1 is unsupported by evidence in the case, and that without it the jury would have been adrift in a sea of evidence heard over the course of almost a month, we cannot hold that the trial judge abused discretion in permitting the jury to gain, from J-1, whatever aid it could in evaluating plaintiff's various claims.

Cross v. Robert E. Lamb, Inc., 60 N.J. Super. 53 (App. Div. 1960), certif. den. 32 N.J. 350 (1960) upon which defendant principally relies, is inapposite. In Cross, the court's condemnation of blackboard argumentation was based primarily on the lack of evidential support for the figures counsel listed on the

blackboard. Id. at 70-80. Even in Cross, however, the court was careful to avoid giving the impression that all such demonstrative argument was improper.

> We do not suggest that there are no situations at all in which the general formula approach to argument of lost future wages, with or without use of a blackboard, could properly be employed. As in trial practice generally, a broad discretionary area reposes with the trial judge. We decide only that what was done here was improper and prejudicial for the reasons we have assigned.
>
> [60 N.J. Super. at 80]

In arriving at his conclusion to permit jury use of J-1, the trial judge considered "the length of the trial, the number of exhibits in this case, the testimony with respect to charges, that most certainly this will aid the jury in arriving at a fair and proper verdict." Indeed, the jury listened to over two weeks of testimony, both live and by deposition, observed the reception of over 300 exhibits, and had its collective mind filled with a seemingly endless stream of figures. The amounts in controversy were not small. As of the date plaintiff's

complaint was filed, the bills submitted by defendant to the Township totalled $321,028.06 of which sum the Township had paid defendant $283,609.84. We cannot conclude, on this record and in this kind of case, that the judge strayed in his discretionary determination.

Finally, we cannot but note that the jury's verdict reflects no reliance on J-1. Neither of the two verdict dollar figures is in the least congruent with any of the calculations contained in J-1. We conclude, as did plaintiff, that the jury probably did follow the trial judge's instructions by using J-1 merely as an aid in evaluating the multitudinous evidence in the case. Hence, if permitting jury use of J-1 was error, it was, in the given circumstances, a harmless one.

Defendant next contends that the following portion of the trial court's charge, given over his objection, constitutes reversible error.

> Now, there's a rule of evidence which provides that the absence of a record of a memorandum or event is admissible to prove the non-occurrence of the event if it had been the regular practice to make such a memorandum of record. The defendant contends that it was his practice to insert notes into files of Township legal matters recording his time spent on the telephone, in meetings and in superimposing his efforts for the services rendered by others. If there are not any notes -- any such notes in the files which have been introduced in evidence, then you may permissably infer that the absence of such notes means that with respect to such files the defendant did not render any additional time for telephone calls, conference and superimposition of his time he did render services in such file.

Hecker's testimony concerning the existence of notes of time spent on Township matters is equivocal. He maintained that he, at times, kept notes. Other times, he relied on his own recollection of time spent. The reason some notes of time spent were not in the files was because he destroyed them after the matter was billed. Hence, defendant argues that the charge was incorrect because the testimony left no room for the "permissible inference" to which the trial judge referred. We disagree. Plaintiff's testimony, even if contradicted, need not have

been accepted by the jury. The jury was free to conclude from this testimony alone that defendant never made notes of time spent, because, had he done so, he would not have destroyed them until the bills were paid without questions or complaint. Moreover, defendant's testimony was contradicted by his secretary's testimony. She stated that she did not recall his destroying any filed matter. Hence, the testimony did disclose a factual question as to the extent time records were kept, and whether or not those which were kept, if any, were destroyed. In this posture of the proofs we regard the charge as fair and, even if erroneous, harmless in the evidential context. Indeed, considerable justification could have been found in this record for the far more threatening adverse inference arising from spoliation of evidence. See State v. Council in Div. of Resource Development, 60 N.J. 199 (1972).

The next three issues raised by defendant can best be considered in connection with the first issue raised by the Township on its

cross-appeal. All four issues relate to that count of the Township's complaint, dismissed by the trial judge at the close of plaintiff's case, which sought damages arising out of an allegedly baseless lawsuit brought by defendant Hecker against the Township and some of its officials well before the Township instituted the present action, which the Township contended constituted malicious abuse or process.

Some description of this prior litigation is necessary for an understanding of the issues spawned by it and resolved by the trial court. In October 1974, more than seven months after defendant Hecker's resignation as township attorney became effective, and a few weeks before the municipal general election, defendant Hecker prepared the complaint which later became Hecker v. Zaun, et al., Docket No. L-8097, in which he named as defendants three of the five Township Committee members (apparently only the democrats were included), the Township itself, and the Township's attorney. The complaint was

inartfully drawn. It is a lengthy document, divided into separate counts, the first of which contains approximately 45 paragraphs. We find it almost impossible to discern, by other than deduction or sheer guess work what the basis of the suit really is. Some of the allegations suggest breach of contract, and some suggest defamation and that it is for the injury to his reputation that he seeks redress. Some allegations clearly suggest conspiracy. No one disputes, however, that the basic claim was for post-resignation fees, unpaid by the Township. Apparently, aware that the claim for unpaid pre-resignation bills might be barred by judgment in this lawsuit, Hecker carefully and expressly reserved the right to assert that claim later on. Hecker contends here, as he did in the trial court, that the claim so reserved in Hecker v. Zaun, for unpaid pre-resignation fees, ultimately survived the dismissal of Hecker v. Zaun on its merits and was properly asserted as a counterclaim in this suit. The trial court,

in substance, held that the attempt to reserve the pre-resignation fees for later litigation was unavailing in the face of the "entire controversy doctrine."

That ruling is the subject of one of the issues defendant raises on this appeal. We conclude that the counterclaim was properly dismissed and for the right reasons. There is no question that when Hecker v. Zaun was filed, approximately seven months after defendant's resignation, substantial pre-resignation bills remained unpaid. Indeed, by his attempted reservation of that claim, defendant admitted their existence, if not their amount. Further, the fees were clearly part and parcel of a series of related transactions between the defendant and the Township arising out the attorney-client relationship.

There can no longer be any basis to misapprehend the determination of the courts of this state that a single action be the vehicle for a just and expeditious determination of an

entire controversy on its ultimate merits. Ajamian v. Schlanger, 14 N.J. 483 (1954); Falcone v. Middlesex County Med. Soc., 47 N.J. 92 (1966); Wm. Blanchard Co. V. Beach Concrete Co., Inc., 150 N.J. Super. 277, 292-295 (App. Div. 1977); Malaker v. First Jersey, 163 N.J. Super. 463, 491-500 (App. Div. 1978), certif. den. 79 N.J. 488 (1979).

Had defendant asserted the claim embraced within his counterclaim in the prior action, such action on his part could have forced the Township to the issue much earlier and that earlier suit could have been the vehicle of a final dispostion of all of the parties' claims and counterclaims. As it turned out, however, Hecker v. Zaun was only the opening salvo. The litigants required attorneys for that suit as well as for the present one. The courts of this State wrestled with Hecker's prior suit and are now confronted with another aspect of the controversy which should have been previously settled.

Apart from the difficulty in perceiving damage to defendant on all but a theoretical basis in the dismissal of his claim for unpaid bills, when the jury found that so much of what the Township did pay was recoverable as excessive, we are entirely satisfied that the counterclaim was properly dismissed on "entire controversy" grounds.

Two of the four issues relating to Hecker v. Zaun can conveniently be considered together. First, on its cross-appeal, the Township challenges the dismissal, during trial, of its claim that the filing of Hecker v. Zaun constituted malicious abuse of process. Second, on Hecker's appeal, he contends that the claim was so deficient that the trial court erred in refusing to dismiss it before trial on his motion of summary judgment.

On its cross-appeal, the Township contends that adequate evidence supported its claim that in filing Hecker v. Zaun, defendant's primary motivation was not to recover damages but to

coerce the Township into reinstating him as township attorney on his terms. This improper motive, according to the Township's theory, was evidenced (1) by testimony of defendant's statements that he would dismiss the suit if the Township would reinstate him; (2) by his joinder of the township attorney as a party to the suit necessitating retention of outside counsel to represent the several defendants, (3) by his dissemination to the newspapers of the contents of his complaint days before it was filed and its filing months before service of process was made on the defendants (4) by his joinder thereto as parties defendant only those members of the township committee who were democrats.

Further, the Township contends that Hecker v. Zaun was clearly a baseless suit evidenced from a reading of the complaint itself and from the fact that it was dismissed before trial only months after service of process was ultimately made and from the fact that defendant never even bothered to appeal from that dismissal.

Although disposition of the abuse of process count is not, in our view, free from doubt, we are constrained to agree with the dismissal and with the technical reasons given therefor. We reach this conclusion notwithstanding ample evidence suggesting that defendant instituted his action (an essentially baseless one) with the ulterior motive of coercing several members of the Township Committee to reinstate him as township attorney. Viewed in a light most favorable to the Township, a jury could, with confidence, have concluded that the suit was intended, by the exertion of the economic pressure of counsel fees to coerce members of the Township Committee, and thus the Township itself, to reinstate defendant to his prior position and on his terms. The defect in this claim, however, and the defect which caused dismissal of the action was that all action by Hecker to misuse the lawsuit, e.g., the communication of his condition for dismissing the suit, reinstatement, predated issuance of summons in that prior suit.

The trial judge properly, we think, declined to view the filing of the complaint as the issuance of process. A complaint is not process. It can remain on file, without further action, and without result, until perhaps a court acts to dismiss it for lack of prosecution. Until summons is served on a filed complaint, no defendant is required to answer to any claim or charge. A filed complaint is not capable of being abused without service of summons. The filing of an instrument which, of itself, lacks power or capacity to affect legal rights cannot be regarded as court process.

The distinction here is critical because the only evidence of Hecker's attempts to use the economic coercion of requiring plaintiff to defend his lawsuit as a means of forcing his reinstatement predated service of summons but followed filing of the complaint. Thus, under the so-called "further acts" doctrine, apparently accepted by New Jersey in the recent Penwag Property Co., Inc. v. Landau, 76 N.J. 595, 597

(1978), aff'g 148 N.J. Super. 493, 499 (App. Div. 1977), basic to a cause of action for maliciious abuse of process "is the requirement that the litigator perform further acts after the issuance of process which represent the perversion or abuse of the legitimate purposes of that process..... Coercive action or bad motives or intent prior to or leading to the institution of the lawsuit do not suffice to expose a plaintiff to a cause of action for malicious abuse of process." (Emphasis supplied) The New Jersey status of the "further acts" doctrine have been in question for many years. In Gambocz v. Apel, 102 N.J. Super. 123, 130-131 (App. Div. 1968), for example, the court specifically noted the existence of two lines of authority, one requiring "further acts" after issuance of process, a requirement suggested by prior New Jersey law, and significant cases from other states dispensing which such a requirement. By its affirmance in Penwag, supra, therefore, the Supreme Court resolved New Jersey's position

holding that the tort of malicious abuse of process requires evidence of further acts of abuse.

There is no question that all evidence of coercion occurred before issuance of process, albeit after the complaint was filed. We are constrained, therefore, to follow binding precedent.

Defendant, however, is not satisfied by the trial court's granting of his motion to dismiss the malicious abuse of process claim after plaintiff's case had closed. He contends that the trial judge erred in denying his pretrial motion for summary judgment with respect to that claim. He considers himself aggrieved by the denial of his motion for summary judgment, because by reason thereof, evidence concerning the count for malicious abuse of process was brought to the attention of the jury and hence colored their consideration of the other aspects of the case. We view this contention as frivolous

entirely apart from the question as to whether summary judgement was properly denied. Had defendant conceived that evidence concerning the malicious abuse of process count would prejudice the jury's ability to assess evidence with respect to the other counts of the complaint, he was free to seek a separate trial thereof. He cannot, however, take no action, agree to try all counts together, and when his motion to dismissal of a count is granted at the close of a plaintiff's case, appeal on the basis that the dismissal should have been granted earlier. Moreover bearing in mind the technical grounds on which the claim was dismissed the trial judge correctly denied summary dispostion.[2]

The same kind of technical deficiencies defeat plaintiff's cross-appeal with respect to the statutory penalties claimed by reason of

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2 Because of these rulings, however, we need not decide whether Brune's testimony was competent.

defendant's failure to return the Township's files. This claim was based upon a provision of the Local Fiscal Affairs Law (N.J.S.A 40A:5-1, et seq.) which reads as follows:

> Whenever any official ceases to hold office in any local unit, on the day of the expiration of his term of office, he shall forthwith deliver to the clerk of the local unit, or other person who may be designated by the governing body to receive the same, all moneys, papers, books, memoranda, accounts and any data of any nature whatever pertaining to his office.
>
> On failure or refusal to carry out the provisions of this section within 5 days after the expiration of his term, he shall, on notice in writing of such delinquency from the chief executive officer of the local unit, be subject to a penalty of $50.00 for each day of refusal or neglect to comply therewith. The penalty shall be collected by the local unit in an action at law.
>
> [N.J.S.A. 40A:5-20]

Defendant ceased to serve as Township Attorney as of February 20, 1974. By letter dated September 13, 1974, the clerk-administrator of Dover Township, L. Manuel Hirshblond, wrote defendant the following letter:

> Pursuant to a Resolution dated September 10, 1974 adopted by the Dover Township Committee, I have been directed to request

> you to return any and all Dover Township legal files and records of the Township, together with any outstanding bills you may have for compensation, within one week of your receipt of this letter.

Plaintiff, in its claim, asserts that files were not returned for some 494 days, measured from September 20, 1974, the date of receipt of the notice and thus claims statutory penalty in the amount of $24,700.

The trial court dismissed this claim on the grounds that, since a statute imposing a penalty should be strictly construed[3] no evidence of notice "from the chief executive officer of the local unit..." was adduced. Hirshblond's communication, being only a letter from the Township's clerk-administrator, did not constitute the required notice.

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3 Maplewood v. Tannenhaus, 64 N.J. Super. 80, 89 (App. Div. 1960); State v. Vanderhave, 47 N.J. Super. 483, 492 (App. Div. 1957), aff'd 27 N.J. 313 (1958).

We agree and for the same reasons. We add only that the notice itself failed to refer to the penalty and failed to warn defendant of the penalty attendant on any delay in returning Township files. These latter omissions would not defeat a valid claim but are noted as suggesting something less than fair dealing with respect to this matter.

Affirmed.

A TRUE COPY

s/ Elizabeth McLaughlin

Clerk

Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1831

LAURENCE A. HECKER
Petitioner,

vs.

TOWNSHIP OF DOVER
Respondent.

STATEMENT IN OPPOSITION TO
PETITION FOR CERTIORARI
To the New Jersey Supreme Court

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IN THE

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vs.

TOWNSHIP OF DOVER
Respondent.

STATEMENT IN OPPOSITION TO
PETITION FOR CERTIORARI
To the New Jersey Supreme Court

Respondent, Township of Dover, hereby opposes the granting by this Honorable Court of a writ of certiorari to review the judgment of the New Jersey Supreme Court entered on February 11, 1980, in Township of Dover v. Hecker, Docket No. C-420, Supreme Court of New Jersey, 1979, affirming a judgment

against petitioner in a civil action.

OPINIONS BELOW

The decisions of the New Jersey Supreme Court and of the Appellate Division of the Superior Court of New Jersey relevant hereto are annexed to the Petition for Certiorari herein. The denial of the Petition for Certiorari to the Supreme Court of New Jersey is reported at 82 N.J. 296 (1979); the opinion of the Appellate Division is unreported.

JURISDICTION

Respondent asserts that no original jurisdiction of this Court solely based upon the Fourteenth Amendment to the Constitution of the United States exists herein, and that a grant of certiorari herein would be improvident by virtue of the provisions of U.S. Sup. Ct. Rule 19 (1) (a), 28 U.S.C.A. and 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

The questions presented for this Court's review are set forth in the Petition, at 2 - 3.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts the applicability of U.S. Constitution, Amendment 14.

REASONS WHY THE WRIT SHOULD BE DENIED

It should be noted by way of preface that the within Petition is entirely devoid of a valid jurisdictional statement as required by U.S. Supreme Court Rule 23 (1) (b) (iii), 28 U.S.C.A. Petitioner apparently seeks to have this Court grant certiorari herein based entirely upon an alleged original jurisdiction of this Court under the Fourteenth Amendment to the United States Constitution. Such an allegation is outside the purview of the appropriate jurisdictional statute, 28 U.S.C. §1257 (3), and this lack in and of itself is

sufficient to defeat the jurisdiction in certiorari of this Court. However, the allegations of the Petition will be treated on their merits herein, notwithstanding this absence of jurisdiction, for the guidance of the Court.

AS TO QUESTION 1: Petitioner alleges before this Court, for the first time anywhere, that the placing of the testimony of witnesses Brune and Gilroy before the jury denied him fundamental fairness under the Fourteenth Amendment. Such an argument is clearly without merit.

The gravamen of petitioner's argument is that, since the testimony of Brune and Gilroy went to an issue on which judgment was granted in defendant-petitioner's favor at the close of plaintiff-respondent's case, the entry of that judgment precluded

his introduction of rebuttal testimony and thus deprived him of a fair trial. What petitioner omits is that the grant of judg ment was on his own motion. The Rules Governing the Courts of the State of New Jersey, specifically R. 4:40-1, permit the making of a motion for judgment either at the close of the evidence offered by any party or at the close of all the evidence:

> Rule 4:40-1 Motion for Judgment at Trial.
>
> "A motion for judgment, stating specifically the grounds therefor, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent. If the motion is made prior to the close of all the evidence and is denied, the moving party may then offer evidence without having reserved the right to do so. A motion for judgment which is denied is not a waiver of trial by jury even if all parties to the action have so moved."

Counsel for petitioner apparently chose for tactical reasons to make the motion

at the close of plaintiff's case rather than at the close of all the evidence. The statement by petitioner on Page 7 of his Petition that the only alternatives were 1) to move at the close of plaintiff's case or 2) to permit the matter to go to the jury, is simply inaccurate in light of the Rule. This Court has previously addressed the question of its jurisdiction over possible due process violations created by a tactical decision of State trial counsel pursuant to a valid State procedural rule. Henry v. Mississippi, 379 U.S. 443 (1965), at 447-449. The test, according to Henry, supra, is whether the procedural rule in question serves a legitimate State purpose or is merely a pretext for the abrogation of Federally protected rights. Petitioner has not alleged, and does not allege here, that Rule 4:40-1 serves no legitimate state interest, or that it is violative of

any Federally protected right. Absent such a Federal question properly raised below, this Court is without jurisdiction to hear such a challenge--even if raised in the Petition--by way of certiorari. 28 U.S.C. §1257; Henry, supra. (It might be noted parenthetically that the Appellate Division of the Superior Court of New Jersey described this argument on appeal as "frivolous" under State law and procedure. Appellate Division opinion, page 22.)

AS TO QUESTION 2: Apparently petitioner now feels that the inclusion of certain matters pertaining to his post-judgment conduct created prejudice in the minds of the Appellate Division judges hearing the case on appeal. It should be noted that the matter complained of was a part of the Court's record of the case in any event--and was merely a recitation

in an affidavit by respondent's counsel of various statements of petitioner, taken under oath at supplemental proceedings in aid of the judgment, in which petitioner testified as to various transfers of assets outside the State of New Jersey in order to avoid levy. Respondent, upon taking the aforementioned testimony, moved for the issuance of a writ of capias ad satisfactiendum, which writ was issued as a part of the proceedings herein. A complete record of the proceedings below, then, had to include the issuance of the writ and its supporting documents. It should also be noted that a hearing was held on petitioner's application for a stay of the writ, at which hearing petitioner produced absolutely no evidence in rebuttal of that adduced by respondent--as indeed he could not, since the evidence

adduced by respondent was from petitioner's own mouth.

Notwithstanding the above, however, it must be noted that petitioner at no time--either before the Appellate Division or before the New Jersey Supreme Court--moved to strike the allegedly offensive material or for the disqualification of the appellate panel. R. 1:12-2 of the New Jersey Court Rules states:

> Rule 1:12-2 Disqualification on Party's Motion.
>
> "Any party, on motion made before trial or argument and stating the reasons therefor, may apply to a judge for his disqualification."

Motions to strike portions of the appendix are not specifically addressed in the Rules but there is ample New Jersey authority for the striking of impertinent, scandalous, or other improper matter from pleadings on appeal. Cf. Gargano v. Venezio, 37 N.J. Super.

129 (App. Div., 1955); Abel v. Elizabeth Board of Works, 63 N.J. Super. 500, 509 (App. Div., 1960); In re Glauberman, 107 N.J. Eq. 384 (E. & A., 1930); Epstein v. Kuvin, 23 N.J. Super. 482 (App. Div., 1952), and cases cited therein. Even in light of the absence of any specific New Jersey rule on point and affording petitioner the benefit of the doubt as to the proper procedure before the Appellate Division, it is clear that this is a matter that could properly have been raised before the Supreme Court of New Jersey. It was not. It is therefore not within the province of this Court to consider even if it presents a Federal question (which, it is submitted, it clearly does not). Edelman v. California, 344 U.S. 357, 358 (1953); Henry v. Mississippi, supra.

AS TO QUESTION 3: Petitioner's argument rests on the following two points: a) The Appellate Division's ruling demonstrated a lack of familiarity with the record and was therefore violative of due process of law; and b) For the Appellate Division to have required petitioner's counsel to object to specific aspects of Exhibit J-1 at trial would have been to place "an unreasonable burden" on petitioner and his counsel. (Petition, at 14).

As to the first argument, that aspects of Exhibit J-1 were not supported by the record, petitioner's complaint is met by the Appellate Division's ruling that his counsel should have pointed out to the trial court what specific aspects of J-1 were in fact unsupported and objectionable so that the exhibit could be modified. (It should be noted that the "J" designation stands for a judicial, not a joint, exhibit.) Petition-

er's counsel chose merely to object to the entire document's admission--leaving the trial court with the choice to either admit it entirely or strike it entirely. The applicable Rule is R. 1:8-8, which states:

> Rule 1:8-8 Papers, Exhibits, etc., to Jury Room.
>
> "The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties."

Petitioner does not challenge the constitutionality of R. 1:8-8 either before this Court or below. Petitioner's counsel below made a tactical election not to make specific challenges

to the exhibit. Presuming the underlying rule valid under State law, the challenge before this Court must be denied under this Court's decision in Henry v. Mississippi, supra, as the trial strategy of petitioner's counsel amounted to a deliberate bypass of a valid and available State remedy.

To state that making specific objections to Exhibit J-1 would place an undue burden on petitioner's counsel is ludicrous. Petitioner's trial counsel has been admitted to the Bar of New Jersey since 1953, and has a reputation as a fine trial attorney. In point of fact, petitioner's counsel is the chief author of a three-volume treatise on pretrial and trial practice in New Jersey, see New Jersey Auto Law, §§ 1-1855. It is also noteworthy that petitioner is also a member of the New Jersey Bar and has been so since 1965. For petitioner to say that two

attorneys with a combined total of 38 years' experience at the bar could not together determine which parts of an exhibit conformed to the trial proofs strains credulity, to say the least.

Petitioner's argument that his counsel stated the risks inherent in submitting J-1 to the jury is accurate; however, counsel made absolutely no effort to state which parts of J-1 would create those risks. Under those circumstances, the court correctly ruled that the exhibit was on the whole admissible and properly admitted it. Trial counsel could have handled the matter differently and in a way that might have rectified the alleged wrong; as he made a tactical election under a valid State rule to handle the matter as he did, such election may not be challenged before this Court on due process grounds. Henry v. Mississippi, supra.

In sum, then, each of petitioner's grounds for seeking certiorari to the Supreme Court of New Jersey have been shown to be improper. There has been no Federal question in any way raised below; petitioner's assignments of error, if error at all, are clearly based upon adequate State grounds, cf. Michel v. Louisiana, 350 U.S. 91 (1955); and Edelman v. California, supra; and the tactical elections of petitioner under State procedures preclude this Court from review. Henry, supra.

For the aforestated reasons, then, respondent respectfully prays that this Court deny to petitioner the issuance of a writ of certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

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